NOT FOR PUBLICATION

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

LINDA PEREZ and JASON PEREZ,	
Plaintiffs,	**CIVIL NO. 2001/11**
v.	
SPHERE DRAKE INSURANCE, LTD., f/k/a SPHERE DRAKE INSURANCE, P.L.C.,	
Defendant	

TO: Lee J. Rohn, Esq.
Treston Moore, Esq. - Fax 777-5498

ORDER DENYING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

THIS MATTER came for consideration on Defendant's Motion for Protective Order as to the file of Defendant, Cheryl Wade's counsel.[1] Plaintiffs filed opposition to the motion and Defendant replied to such opposition.

Defendant moves for a protective order with regard to Plaintiffs' Notice of Deposition *Duces Tecum* directed to Attorney Felice Quigley. The subject subpoena requests Attorney Quigley's complete file in *Linda Perez et al. v. Cheryl Wade*, Terr. Ct. Civ. No. 723/1996. That action concerned a fire at Dr. Cheryl Wade's property during which a tenant suffered property damage and Linda and Jason Perez were injured. The parties sued Dr.

1. Defendant's caption incorrectly includes the "improperly designated" notation. See Order dated May 17, 2001 in such regard.

Wade who was insured by Sphere Drake. Sphere Drake retained Attorney Quigley to represent Dr. Wade. The tenant settled with Dr. Wade and assigned her rights to Linda Perez. The Perez's settled their claim with Dr. Wade for a total of $500,000.00 and agreed to collect such settlement only from Sphere Drake. Dr. Wade then assigned all of her claims and rights against Sphere Drake to Linda Perez.[2]

This suit concerns a dispute over the extent of applicable insurance coverage. Sphere Drake has paid the non-disputed $100,000.00 coverage and disclaims any further liability. Plaintiffs seek recovery of their entire Territorial Court settlement plus punitive damages for bad faith refusal to settle. By Order dated May 17, 2001, the Court bifurcated Plaintiffs' claims for bad faith and punitive damages and directed that discovery proceed on the remaining contractual dispute issue.

In this motion, Defendant asserts that Attorney Quigley's file is protected by attorney-client and work product privileges; is protected by the dual/joint defense principle; and is in any event irrelevant to the breach of contract issue. Plaintiff retorts that the asserted privileges do not apply or have been

2. Linda Perez filed this suit individually and as mother and next friend of Jason Perez, a minor.

waived; that Defendant has not complied with Fed. R. Civ. P. 26(b)(5) regarding proper assertion of privileges; and that there was no joint defense in the underlying Territorial Court suit.

Generally, a party has no standing to quash a subpoena served on a third party except for claims of privilege. Fed. R. Civ. P. 45(d)(2); *Thomas v. Marina Associates*, 202 F.R.D. 433, 434 (E.D. Pa. 2001); *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Col. 1997); *Oliver B. Cannon & Son, Inc. v. Fidelity and Casualty Co. of N.Y.*, 519 F.Supp. 668 680 (D. Del. 1981). Accordingly, there is no basis for Defendant's objection based on relevance.

Regarding Defendant's assertions of privilege it has not provided the requisite specifics necessary therefor. Fed. R. Civ. P. 45(d)(2) provides that when information is withheld on a claim that it is privileged or subject to protection as trial preparation materials, "...the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim."

> Paragraph (d)(2) is new and is based on Rule 26(b)(5). According to the Advisory Committee, its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate that claim and

> resist it if that seems unjustified...As a result, the claim of privilege must be made 'expressly' and must supply sufficient information for an evaluation of the claim...

Wright & Miller, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2464; Advisory Committee Note to 1991 amendment to Rule 45(d); *Preston et al. v. Settle Down Enterprises, Inc.*, 90 F.Supp. 2d, 1267, 1282 (N.D. Ga. 2000); *In Re: Cooper Market Antitrust Litigation,* 200 F.R.D. 213, 223 (S.D. N.Y. 2001).

Defendant's generalized references to the contents of Attorney Quigley's file provide no basis for evaluation of the claimed privileges.

In any event, Perez is the assignee of Dr. Wade and the privileges asserted by Defendant are inapplicable in this matter.

In *Athridge v. Aetna Casualty and Surety Co.*, 184 F.R.D. 181 (D.D.C. 1998), the assignee of a breach of fiduciary claim against an automobile insurer sued the insurer to recover damages arising from a car accident. The assignee requested documents relating to the insured's attorney's representation of the insured/assignor in separate but related lawsuits. The Court held that the attorney-client and work product privileges could not be asserted against the assignee. The court stated:

> When one lawyer represents two parties or entities, neither can claim an attorney-client privilege when,

> having fallen out, one sues the other and demands to know what the other said to the lawyer when she was representing both of them... This principle has been applied when an insurance company retains counsel who represents the insured. When the insured then sues the insurance company, the courts have rebuffed the company's claiming attorney-client privilege to prevent the insured's access to the documents created by counsel when she was representing the company's and the insured's common interest in defeating the case brought against the insured... The latter principle has been applied with equal force when the insured assigns whatever claim she had to the person who sued in the first place. In that situation, the insurance company cannot claim an attorney-client privilege against the insured's assignee, any more than it could claim it against the insured.

Id. at 186-187 (internal citations omitted), further,

> ...As I explained in connection with Aetna's privilege claim, I am of the view that the attorney-client and work product privileges cannot be raised against an assignee by the assignor where a purported global assignment of claims arising from an event has transpired. This is just as true in the context of the Starrs' representation of Jorge as it **is in the insurance company context in which the insurer and insured share a common interest**. *Id.* at 194 [emphasis added].

Similarly in *Shapiro v. Allstate Insurance*, 44 F.R.D. 429, 431 (E.D. Pa. 1968) Judge Fullam rejected arguments of privilege upon the assignee Plaintiff's request for discovery.

> It thus seems clear that in relation to counsel retained to defend the claim, the insurance company and the policy holder are in privity. Counsel represents both and at least in the situation where the policy holder does not have separate representation, there can be no privilege on the part of the company to require the lawyer to withhold information from his other client, the policy holder. In short, I am satisfied that, with respect to all matters from the beginning of the litigation until

> the termination of the attorney-client relationship between the assured and the attorney, there can be no attorney-client privilege which would prevent disclosure to the policy holder.

See also: *Simpson v. Motorist Mutual Ins. Co.*, 494 F.2d 850, 855 (7th Cir. 1994)("That the insured's claim was assigned to the Plaintiff did not constitute grounds for the application of the attorney-client privilege"); *Central National Insurance Co. of Omaha v. Medical Protective Co. of Fort Wayne, Indiana*, 107 F.R.D. 393, 395 (E.D. Mo. 1985); *Layton v. Liberty Mutual Fire Ins. Company*, 98 F.R.D. 457, (E.D. Pa. 1983); *Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 368 (D. Del. 1975).

The joint defense privilege has expressly been denied in similar situation. See *e.g. Dome Petroleum, Ltd. v. Employers Mutual Liability Ins. Co. of Wisconsin et al.*, 131 F.R.D. 63, 66 (D. N.J. 1990); *Security Investor Protection Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 437 (S.D. N.Y. 1997).

In the Matter of a Grand Jury Subpoena Duces Tecum dated November 14, 1974, 406 F.Supp. 381, 394 (S.D. N.Y. 1975), the court stated:

> The attorney-client privilege as noted above, is no less vital to the functioning of a joint defense than it is to the proper course of wholly independent representation. Nevertheless...the law exacts a higher cost for participation in a joint defense. To be sure, confidences shared by joint defendants and their counsel are

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> effectively shielded against outside access...**that shield may be lowered only when the parties once joined assume the stance of opposing parties in subsequent litigation.** This restructuring of the parties' rights is a logical incident of their later posture: when they face one another in litigation, neither can reasonably be allowed to deny to the other the use of information which he already has by virtue of the former's own disclosure [emphasis added].

Accordingly for reasons above stated, it is hereby;

ORDERED that Defendant's Motion for Protective Order concerning production of Attorney Quigley's file is DENIED.

ENTER:

Dated: February 15, 2002

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JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By:_____
Deputy Clerk